defendant was deprived in the principal case. He was represented by counsel throughout. In a criminal proceeding all defences to the merits except the jeopardy pleas come in under the plea of not guilty, so that there is no reason for the application of the technical rule of civil pleading that the record must show the issue. The defendant had the full benefit of a plea of not guilty.

There is not much authority on this point in England. One early case was reversed for want of a plea of record;[4] but there has been a tendency to distinguish this precedent.[5] In Mortimer's case, relied on by Hale,[6] there was no trial at all; nor was the defendant present. The earls and barons came in Parliament before the king, and said they knew the defendant was a notorious traitor and condemned him to a traitor's death.[7] Arraignment and plea were usually very substantial rights in the times when the preliminary examination was secret, the witnesses for the prosecution not disclosed, no compulsory process for defendant's witnesses, almost no rules of evidence and no counsel. With the modern changes in criminal trials, the plea has become a mere form which should be waived by going to trial without objection.

The Court of Appeal does not profess to overrule the earlier California cases, but places its decision on the recent amendment to the constitution.[8] This amendment is performing a service in enabling the court to free the law from the technical rulings of the sixteenth century, that have been blindly followed ever since, despite the change in conditions. The amendment, however, seems to make it necessary for the Appellate Court to read the entire record to determine whether substantial justice has been done though the fault complained of is merely a technical one. This seems too great a burden to impose on an overworked court. A. M. K.

Criminal Law—Place of Trial—Jury of Vicinage.—The defendant committed bigamy in San Diego county, was arrested in Los Angeles, and tried in the latter county under Section 785 of the Penal Code which gives jurisdiction in bigamy cases either where the crime was committed or where the defendant was apprehended. The District

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[4] Chitty, Criminal Law, star page 418 (1869), 3 Mod. 265.

[5] Hawkins, Pleas of the Crown, Vol. 2, p. 435; Chitty, supra.

[6] Hale, Pleas of the Crown, Vol. 2, p. 218.

[7] (1330), 1 State Trials 51.

[8] Article VI, Sec. 4½. No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Court of Appeal of California sustained a conviction over the objection that the constitutional right to a trial by a jury of the vicinage was violated, on the ground that a jury of the vicinage means a jury of the place designated by the legislature for the trial.[1] No authority is cited by the court for its position.

The threat to take colonists to England for trial on a charge of treason was one of the grievances leading to the Revolution.[2] Accordingly we find the federal,[3] and usually the State constitutions, providing for trial by jury of the county or district where the crime was committed, although the language of the constitution of California and of some other States is simply that the right to trial by jury shall remain inviolate.[4] The provisions of the federal constitution do not, of course, bind the States.[5] Under the State constitutions, the decisions are in hopeless conflict, ranging from rulings that venue is a matter for legislative determination[6] to decisions that the legislature cannot provide that an offense committed on a moving train may be tried in any county through which the train shall pass on the trip.[7]

Trial by jury of the vicinage goes back to the beginning of the jury system.[8] At a time when juries heard no evidence but went on their own knowledge, obviously it was only a jury of the neighborhood that possessed that knowledge. In later times it has been said that a jury of the vicinage secured to the defendant the benefit of his character among his neighbors,—a very doubtful benefit in many cases, and besides not always true, for the place where the crime is committed, not the residence of the defendant, determines the venue. The English law has never made a fetich of the rule. Statutes have made exceptions in the case of crimes committed on moving boats or trains, or near the boundary line of two counties, and in the case of such crimes as forgery and conspiracy where the venue is difficult to prove. Stephen, in his History of the Criminal Law of England, speaking of the original rule as modified by these statutes, says, "A rule which requires eighteen statutory exceptions, and such an evasion as the one last mentioned in the case of theft—the commonest of all offenses—is obviously indefensible. It is obvious that all courts otherwise competent to try an offense shall be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offense was committed would be the most convenient place for the purpose."[9]

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[1] (Dec. 16, 1912), Application of Macdonald, 15 Cal. App. Dec. 802.
[2] Declaration of Independence; Declaration of Rights, Oct. 14, 1774.
[3] Constitution of the United States, Art. III, Sec. 2.
[4] Constitution of California, Art. I, Sec. 7; Amendments, Art. VI.
[5] Nashville C. & St. L. R. Co. v. Alabama (1888), 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. Rep. 28.
[6] Bishop, New Criminal Procedure, Sec. 47.
[7] State v. Anderson (1905), 191 Mo. 134, 90 S. W. 95.
[8] Hale, Pleas of the Crown, Vol. 2, p. 264; Hawkins, Pleas of the Crown, Vol. 2, p. 559; Blackstone, Book 4, p. 350.
[9] Stephen, History of the Criminal Law of England, Vol. 1, p. 278.

The English protests against the infringement of the right were directed towards the substantial grievance of trials for treason in such place as the king might choose, especially by irregular courts. It may be noted that Section 785 construed in the principal case is taken from an old English statute.[10]

In People v. Powell,[11] the provision (since repealed), in Section 1033 of the Penal Code, for a change of venue on the application of the District Attorney in cases where, from any cause, no jury could be obtained where the action was pending, was held unconstitutional. The reasoning was that trial by jury was incorporated in the constitution with all its common law incidents. The Court overlooked the fact, however, that the place of trial could be changed at common law. The King's Bench always had the power to remove a case by certiorari; when this was done, ordinarily trial was by a jury of the county where the crime was committed, but the place could be changed by the Crown on proper cause shown.[12]

People v. Powell is probably overruled in California;[13] and its fallacies have been exposed in other jurisdictions.[14] It would seem, however, that the principal case goes too far the other way in holding that "under the constitution the place of trial is subject to legislative determination." Can the legislature provide that any crime may be tried in any county of the State? It is one thing to hold that the constitution does not prevent the legislature from fixing the place of trial in another county where reasonably necessary and where the defendant is not really prejudiced; it is another thing to hold that the legislature can authorize a trial in a distant and perhaps hostile county.

The substantial right secured by the constitution is that the defendant shall not be taken by State officers to a distant county where the difficulty and expense of securing his witnesses and making a defense may prevent a fair trial. Much merited reproach has been heaped on the law by the technical and unsound interpretation of constitutional rights in such cases as People v. Powell, but there is always need to preserve substantial rights. The federal executive authorities have shown a tendency to strain the law for the purpose of removing defendants to Washington for trial.[15] A. M. K.

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[10] Chitty, Criminal Law, star page 181.

[11] People v. Powell (1890), 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

[12] Chitty, Criminal Law, star pages 201, 494; Rex v. Harris (1762), 3 Burrows 1330; Reg. v. Barrett Dr. R. 4 C. L. 385; Reg. v. Phelan (1881), 14 Cox C. C. 579.

[13] People v. Prather (1901), 134 Cal. 386, 66 Pac. 483.

[14] Barry v. Truax (1904), 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662; State v. Durflinger (1905), 73 Ohio St. 154, 76 N. E. 291; and see State v. Lewis (1906), 142 N. C. 626, 55 S. E. 600, 74 L. R. A. (N. S.) 669.

[15] United States v. Dana (1885), 68 Fed. 886; United States v. Smith (1909), 173 Fed. 227; Hyde v. United States (1912), 225 U. S. 347.